

(2013) 03 GAU CK 0079

In the Gauhati High Court

Case No : Review Petition No. 123 of 2012

State of Assam and Others

APPELLANT

Vs

Smt. Shilla Paswan and Another

RESPONDENT

Date of Decision : 14-03-2013

Acts Referred:

Citation : (2013) 3 GLD 50

Hon'ble Judges : Iqbal Ahmed Ansari, J

Bench : Single Bench

Advocate : D. Saikia, Addl. A.G. Assam and Ms. B. Bhuyan, for the Appellant; H. Talukdar and Ms. M. Deka, for the Respondent

Judgement

Iqbal Ahmed Ansari, J.—The review petitioners were respondents in WP(C) No. 2171/2010 with the opposite party No. 1 herein as the petitioner therein. I have heard Mr. D. Saikia, learned Additional Advocate General, Assam, appearing on behalf of the review petitioners, and Mr. H. Talukdar, learned counsel, for the writ petitioner- opposite party.

2. With the help of this review petition, the review petitioners seek review of the order, dated 28.04.2010, passed, in WP(C) No. 2171/2010. The respondents' prayer for review is resisted by the petitioner in WP(C) No. 2171/2010.

3. Before I turn to the question as to whether the order, dated 28.04.2010, passed, in WP(C) No. 2171/2010, needs to be reviewed and, if so, what would be the result of the review, it is appropriate that the observations made, and the directions contained, in the order, which is the subject-matter of review, be taken note of.

4. With the above end in view, the relevant portion of the order, dated 28.04.2010, passed, in WP(C) No. 2171/2010, is reproduced below:

Heard Mr. H. Talukdar, learned counsel for the petitioner, and Ms. B. Bhuyan, learned Standing counsel, P.W. D. Heard also Mr. B. Gogoi, learned Standing

counsel, Finance Department.

The petitioner's case, in brief, is thus: The petitioner's husband was a casual Muster Roll Worker under the Public Works Department, Government of Assam. While working as a casual Muster Roll Worker, the petitioner's husband died before his service could be regularized. On the ground that the petitioner's husband had not completed 10 years of regular qualifying service, family pension has been denied to her. By filing this writ application, the petitioner has sought for appropriate directions to be issued to the respondents so as to enable her to receive pension following the death of her husband.

It is not in dispute that in similar circumstances, this Court, relying upon the decision of the Full Bench, in *Jitendra Kalita Vs. State of Assam and Others*, has disposed of, on 30.10.2009, a similar petition, which had given rise to WP (C) No. 4558 of 2009, with the following observations and directions:

In that view of the matter, the present petition is disposed of with a direction to the State respondents, more particularly the Chief Engineer, Public Works Department, Govt. of Assam, Guwahati, to verify the service particulars of the petitioner's husband and if the same are found to be correct, the said authority would include his period of service as Muster Roll Worker for the purpose of computation of pensionary benefits to him and after making necessary declaration under the provision to Rule 30 of the Assam Services (Pension) Rules, 1969, would release the family pension to the petitioners, if necessary by creating superannuation posts, subject to other relevant Rules, executing instructions and guidelines. Since the petitioner's husband has expired, the State respondents would take necessary steps indicated hereinabove, as expeditiously as possible, and in any case not later than six (6) weeks from the date of receipt of the certified copy of this order.

As the facts of the present case are akin to the one in WP (C) No. 4558 of 2009, this writ petition is disposed of with the direction that the petitioner's case shall be dealt with by the respondents in the same manner as has been directed above by the order dated 30.10.2009 passed in WP (C) 4558/2009.

With the above observations and directions, this writ petition shall stand disposed of.

No order as to costs.

5. Pointing out to the observations made, and the directions contained, in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, and *State of Karnataka and Others Vs. M.L. Kesari and Others*, the learned Additional Advocate General points out that the decision, in *Uma Devi* (supra), has been explained in *M.L. Kesari* (supra) and if these two decisions are carefully read, it becomes clear that one of the conditions precedent for regularization of service of the casual employee is that his original appointment ought to have been against a valid sanctioned post and, secondly, but equally important, is that

his initial appointment, though ad hoc or casual in nature, must have been consistent with the Rules governing the service concerned or selection ought to have been held by complying with the constitutional guarantee in respect of public employment in the sense that the employment must have been made following some selection process, wherein all eligible persons had been given opportunity to participate.

6. As a one time measure, however, the Supreme Court, in Uma Devi (supra), permitted, points out the learned Addl. Advocate General, regularization of services of irregular and not illegal appointees and one of the principal requirements for regularization, even as a one time measure, was that the appointment must have been made, or the employee concerned must have been allowed to continue, against a sanctioned post.

7. Unless, therefore, submits the learned Addl. Advocate General, the husband of the petitioner, in WP(C) No. 2171/2010, had worked against a sanctioned vacant post, his regularization, during his life time, even for the purpose of pension and pensionary benefits, was not permissible in law. Consequently, further points out the learned Addl. Advocate General, merely because of the fact that the petitioner's husband has died, his service cannot be regularized with retrospective effect for the purpose of making available pension and extending pensionary benefits to the writ petitioner as the legal representative of her deceased husband was not permissible and could not have been legally granted and, hence, the direction given by this Court, in WP(C) No. 2171/2010, to regularize the service of the petitioner's deceased husband for the purpose of enabling the petitioner receive pension and pensionary benefits is contrary to law and may, therefore, be reviewed and recalled.

8. In short, what the learned Additional Advocate General contends is that during his life time, when a person is not entitled to regularization of his service, even for the purpose of pension and pensionary benefits, his service cannot be regularized merely because he is no longer alive and his family is required to be provided with pension.

9. In the case at hand, submits the learned Addl. Advocate General, the petitioner's husband, whose death gave rise to the writ petition, in question, had, admittedly, not worked against any vacant sanctioned post and, hence, his services, during his life time, could not have been regularized and the direction for regularization of his service, merely on the ground that he is no longer alive, was not permissible and cannot be regarded in accordance with law even if regularization, ordered by this Court, was meant for the purpose of making available pension and pensionary benefits to the writ petitioner.

10. Referring to the case of Jitendra Kalita Vs. State of Assam and Others, the learned Additional Advocate General has also pointed out that even in Jitendra Kalita (supra), a Full Bench of this Court has made it clear that regularization cannot be a mode of recruitment.

11. Controverting the submissions, made on behalf of the petitioners, Mr. Talukdar, learned counsel, has submitted that regularization of service of persons, who died as casual employees under the State Government, have been directed by this Court, in the past, for the purpose of making pension available to their respective families and, hence, such a regularization cannot be said to be barred in the light of the position of law, which the learned Additional Advocate General has presented before the Court.

12. It has also been pointed out by Mr. Talukdar, learned counsel, that similar benefits have been extended to some other work-charged employees and, hence, the State cannot be allowed to discriminate and not make available to the petitioner the benefit of pension and pensionary benefits by regularizing the service of her husband.

13. Before dealing with the above aspects of the case, it needs to be borne in mind that an illegality cannot be allowed to be perpetuated in the name of removing discrimination. The mere fact that an authority has passed a particular order in the case of another person, similarly situated, cannot be a ground for issuing a writ in favour of a petitioner on the plea of discrimination if the order, passed in favour of the other person, is found to be contrary to law or not warranted in the facts and circumstances of the case. Noticing that the High Courts, in exercise of their writ jurisdiction, have been passing orders to remove discrimination and thereby asking the authorities concerned to repeat the illegality, the Supreme Court has expressed its anxiety on such an approach and has laid down the position of law, in no uncertain words, in *Chandigarh Administration and another Vs. Jagjit Singh and another*, as follows:

8. We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length. Generally speaking, the mere fact that the respondent authority has passed a particular order in case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be allowed and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent authority to repeat the illegality or to pass another unwarranted order. The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat the illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law- indeed, wherever, it is possible, the Court should direct the

appropriate authority to correct such wrong orders in accordance with law but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition, By refusing to direct the respondent authority to repeat the illegality, the Court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law. Of course, if in case the order in favour of the other person is found to be a lawful and justified one it can be followed and similar relief can be given to the petitioner if it is found that the petitioners' case is similar to the other persons' case. But then why examine another person's case in his absence rather than examining the case of the petitioner who is present before the Court and seeking the relief. Is it not more appropriate and convenient to examine the entitlement of the petitioner before the Court to the relief asked for in the facts and circumstances of his case, than to enquire into the correctness of the order made or action taken in another person's case, which other person is not before the case nor is his case. In our considered opinion, such a course barring exceptional situations would neither be advisable nor desirable. In other words, the High Court cannot ignore the law and the well-accepted norms governing the writ jurisdiction and say that because in one case a particular order has been passed or a particular action has been taken, the same must be repeated irrespective of the fact whether such an order or action is contrary to law or otherwise. Each case must be decided on its own merits, factual and illegal, in accordance with relevant legal principles. The orders and actions of the authorities cannot be equated to the judgments of the Supreme Court and High Courts nor can they be elevated to the level of the precedents, as understood in the judicial word. (What is the position in the case of orders passed by authorities in exercise of their quasi-judicial power, we express no opinion. That can be dealt with when a proper case arises.

(Emphasis is added)

14. From the observations, made in Jagjit Singh (supra), it becomes more than abundantly clear that in the name of removing discrimination, no Court can issue a direction, which would amount to perpetuating of illegality. If, therefore, a person's service cannot be regularized even after his death for the purpose making pension and pensionary benefits available to his legal representatives, it would be impermissible for the Court to issue such a direction and, if such a direction has been issued, then, the direction needs to be recalled.

15. While considering the rival submissions, made before this Court, it needs to be noted that there can be no doubt that the engagement of the husband of the writ petitioner-opposite party No. 1, whose death had given rise to the writ petition, in question, was not made following any selection process. This apart, his engagement was, admittedly, not against any vacant sanctioned post. In fact, his engagement was against non-existent post. In such circumstances,

regularization of his services, in the light of the decisions in Uma Devi (supra), M.L. Kesari (supra) and Jitendra Kalita (supra), is impermissible in law.

16. With regard to the above, it may be noted that while laying down that unless an appointment has been made by observing the constitutional guarantee, as embodied in Articles 14 and 16 requiring an appointment to be made after giving opportunity of participation in the selection process to all eligible candidates, the Constitution Bench, in Uma Devi (supra), make one exception, the exception being that when a person was, admittedly, qualified and was appointed against a sanctioned post and has continued for more than 10 years, in service, without any orders of the Court, then, the State shall undertake an exercise to regularize the service of such a person. The relevant observations, appearing at para 53, in Uma Devi (supra), read as under:

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa (supra), K.N. Nanjundappa (supra), and B.N. Nagarajan (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of Courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of Courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date.

(Emphasis is added)

17. Having considered the exception, which was carved out by the Constitution Bench, in Uma Devi (supra), a two Judge Bench of the Supreme Court, in M.L. Kesari (supra), speaking, through R.V. Raveendran, J., laid down as under:

7. It is evident from the above that there is an exception to the general principles against "regularization" enunciated in Umadevi, if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any Court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.

8. Umadevi casts a duty upon the concerned Government or instrumentality, to take steps to regularize the services of those irregularly appointed employees who had served for more than ten years without the benefit or protection of any interim orders of Courts or tribunals, as a one-time measure. Umadevi, directed that such one-time measure must be set in motion within six months from the date of its decision (rendered on 10.4.2006).

9. The term "one-time measure" has to be understood in its proper perspective. This would normally mean that after the decision in Umadevi, each department or each instrumentality should undertake a one-time exercise and prepare a list of all casual, daily-wage or ad hoc employees who have been working for more than ten years without the intervention of Courts and tribunals and subject them to a process verification as to whether they are working against vacant posts and possess the requisite qualification for the post and if so, regularize their services.

18. From a minute reading of what have been observed above, it becomes clear that as a one time measure, the State was given by the Constitution Bench, in Uma Devi's case (supra), the opportunity to regularize the service of such a person, whose appointment was not illegal, but irregular in the sense that he was qualified to hold the post against which he was appointed and that the post was a sanctioned post. Unless, therefore, a person is found to have been appointed against a duly sanctioned vacant post, his appointment cannot, in the light of the decision in Uma Devi (supra), be directed to be regularized. This is more than abundantly clear from the observations, made, at para 7, in M.L. Kesari (supra), which I have already reproduced above, and para 11 thereof, which is reproduced hereinbelow:

11. The object behind the said direction in para 53 of Umadevi is two- fold. First is to ensure that those who have put in more than ten years of continuous service without the protection of any interim orders of Courts or tribunals, before the date of decision in Umadevi was rendered, are considered for regularization in view of their long service. Second is to ensure that the departments/ instrumentalities do not perpetuate the practice of employing persons on daily-wage/ad-hoc/casual for long periods and then periodically regularize them on the ground that they have served for more than ten years, thereby defeating the constitutional or statutory provisions relating to recruitment and appointment. The true effect of the direction is that all persons who have worked for more than ten years as on 10.4.2006 (the date of decision in Umadevi) without the protection of any interim order of any Court or tribunal, in vacant posts,

possessing the requisite qualification, are entitled to be considered for regularization. The fact that the employer has not undertaken such exercise of regularization within six months of the decision in Umadevi or that such exercise was undertaken only in regard to a limited few, will not disentitle such employees, the right to be considered for regularization in terms of the above directions in Umadevi as a one-time measure.

19. Situated thus, it becomes abundantly clear that when it was not permissible to regularize the appointment of the person concerned during his lifetime, it would be equally impermissible to regularize his service after the individual concerned has died.

20. The direction, therefore, given in the writ petition, for counting the period of service of the writ petitioner's husband, as Muster Roll worker, for the purpose of computation of pensionary benefits by creating, if necessary, superannuary post, is wholly illegal inasmuch as the period of service, which the individual had put in, could not have been counted for the purpose of computation of pensionary benefits. In essence, the directions, given by this Court, in the writ petition, in question, requires regularization of the service of the individual concerned, which, as already discussed above, was impermissible and ought not to have been directed, when the individual concerned had not been appointed or worked against any vacant sanctioned post.

21. Because of what have been discussed and pointed out above, this review petition succeeds. The directions, given by the order, dated 28.04.2010, are hereby set aside and the same shall accordingly stand vacated.

22. With the above observations and directions, this review petition stands disposed of. No costs.